

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

IN THE MATTER OF THE WINDING DOWN OF:

THE NEW HAMPSHIRE MEDICAL MALPRACTICE
JOINT UNDERWRITING ASSOCIATION

No. 217-2015-CV-00347

**AFFIDAVIT OF PETER A. BENGELSDORF, SPECIAL DEPUTY
COMMISSIONER, IN SUPPORT OF APPROVAL OF RETURN OF
STABILIZATION RESERVE FUND EXCESS TO HEALTH CARE PROVIDERS**

I, Peter A. Bengelsdorf, depose and say:

1. I am the Special Deputy Commissioner of the New Hampshire Medical Malpractice Joint Underwriting Association (“NHMMJUA”) appointed by Roger A. Seigny, Insurance Commissioner for the State of New Hampshire, as Receiver (“Receiver”) of the NHMMJUA. I submit this affidavit in support of the Receiver’s Motion for Approval of Return of Stabilization Reserve Fund Excess to Health Care Providers (the “Motion”). In the Motion, the Receiver moves for an order approving return of the approximately \$3.2 million amount remaining in the Stabilization Reserve Fund (“SRF”) to the health care providers who paid surcharges to fund the SRF in proportion to the surcharges they paid. The facts and information set forth in this affidavit are either within my own knowledge gained through my involvement with this matter, in which case I confirm that they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information, and belief.

2. The Order of Rehabilitation issued on July 22, 2015 appointed the Receiver to wind down the business of the NHMMJUA in accordance with RSA 404-C:15 -:17 and RSA 402-C. By statute, the receivership of the NHMMJUA includes the SRF. See RSA 404-C:15, I.

3. The Receiver has been winding down the NHMMJUA's business as reported in the Receiver's monthly status reports. Most significantly, the Receiver entered an Assumption Agreement with The Medical Protective Company ("MedPro") providing for MedPro's assumption of NHMMJUA coverage-related obligations. The Court approved the Assumption Agreement, as amended, on August 5, 2016, and the transaction closed on August 25, 2016.

4. There is approximately \$3.2 million remaining in the SRF after the MedPro transaction. As of January 31, 2018, the SRF funds totaled \$3,243,397. See Exhibit A to the Receiver's Status Report for February 2018. (Monthly investment returns on the SRF funds will add to this sum.) Because the coverage-related obligations of the NHMMJUA – including those regarding pre-1986 policies – have been assumed by MedPro, the NHMMJUA no longer has a deficit as a result of its pre-1986 policies.

5. The regulation governing the SRF provides for the "return" of any excess above the amount necessary to address the pre-1986 deficit to the health care providers who paid into the SRF. Accordingly, the Receiver requests approval of a process to so return the remaining SRF funds. This return of SRF funds is separate from the interpleader of excess funds under RSA 404-C:17, III, which is the subject of the pending appeal. That interpleader concerns amounts remaining after payment of NHMMJUA obligations. The return of SRF funds as provided in the regulation described below is such an obligation.

6. The SRF was established by an emergency regulation effective April 23, 1986 and finally effective July 23, 1986, which created the Stabilization Reserve Fund Trust and SRF.

Ins 1702.071-072 (1986).¹ A copy of the amendments to regulation Ins 1700, including Ins 1702.071-072, effective July 23, 1986 is attached as Exhibit B to the Motion. The regulation provided that the Stabilization Reserve Fund Trust was to maintain the SRF, which “shall be used for payment of any deficit of the Association, which is incurred as a result of policies issued prior to January 1, 1986.” Ins 1702.071(c)(1) (1986).

7. Under the regulation, the SRF was to be funded by a surcharge on “policyholders”, defined as health care providers who were or had previously been insured by the NHMMJUA. The 1986 regulation provided: “Each policyholder purchasing or renewing a policy of medical malpractice liability insurance on or after January 1, 1986 shall pay to the insurer issuing the policy an annual Stabilization Reserve Fund charge in an amount equal to 15% of the annual gross premium charged for primary medical liability coverage.” Ins 1702.071(c)(2) (1986). “Policyholder” was defined to mean “those healthcare providers who are or have been previously insured through the Association.” Ins 1702.071(a)(3) (1986). The surcharge was to be “separately stated in the policy” and “collected by the insurer issuing the policy” for transmission to the SRF. Ins 1702.071(c)(2) (1986). Failure to pay the Stabilization Reserve Fund charge constituted “grounds for cancellation of the policy.” Ins 1702.071(c)(2) (1986).

8. Based on the information available to the Receiver, surcharges were collected from 1986 through 1993. The pertinent part of the regulation effective July 1, 1993 (attached as Exhibit C to the Motion) continued to provide that: “Each policyholder purchasing or renewing

¹ An initial regulation establishing the SRF was promulgated on December 20, 1985. Ins 1702.071 (1985). That regulation was superseded by the emergency rule effective April 23, 1986 (attached as Exhibit A to the Motion). The initial 1985 regulation provided for surcharges on all health care providers in New Hampshire, while the 1986 regulation provided for surcharges only on health care providers who were or had been insured by the NHMMJUA. So far as the Receiver can determine, any initial surcharges on providers who never had been insured by the NHMMJUA were returned in 1986.

a policy of medical malpractice liability insurance on or after January 1, 1986 shall pay to the insurer issuing the policy an annual stabilization reserve fund charge in an amount equal to 15% of the annual gross premium charged for primary medical liability coverage.” Ins 1702.071(c)(2) (1993). “Policyholder” continued to be defined to mean “those healthcare providers who are or have been previously insured through the association.” Ins 1702.071(a)(3) (1993).

9. The most recent regulation (effective January 30, 2009 and attached as Exhibit D to the Motion) similarly provides that there shall be a stabilization reserve fund trust to be “used for payment of any deficit of the association, which is incurred as a result of policies issued prior to January 1, 1986.” Ins 1703.08(a) (2009). “Each policyholder purchasing or renewing a policy of primary medical liability insurance on or after January 1, 1986 shall pay a stabilization reserve fund charge in an amount equal to 15% of the annual gross premium charged for primary medical liability coverage.” Ins 1703.08(b) (2009). The definition of “policyholder” remains the same: “‘Policyholder’ means those health care providers who are or have been previously insured through the association.” Ins 1703.01(l) (2009).

10. Based on the information available to the Receiver, surcharges to fund the SRF were levied on “policyholders” as defined in the regulation during the years 1986 through 1993. That is, the surcharges were paid by health care providers who were current or former NHMMJUA policyholders during those years but not by providers who had never been insured by the NHMMJUA at that time. The surcharge was 15% of annual gross premium during the years 1986 through 1992 and 7.5% of annual gross premium in 1993. Based on the information available to the Receiver, no surcharges were collected after 1993.

11. The regulations addressed the possibility that the SRF would exceed the amount ultimately necessary to pay for the deficit due to pre-1986 policies by providing for “return” of excess funds to providers who were charged. The revised regulation effective April 23, 1986 on an emergency basis and then effective on July 23, 1986 provided that, if the SRF exceeded the amount necessary to pay losses, loss adjustment expense and operating expenses incurred as a result of pre-January 1, 1986 policies, the Trust “shall return the excess to those health care providers who have been charged in a manner which is fair and equitable, subject to the approval of the Commissioner.” Ins 1702.071(c)(5) (1986) (Motion Exhibits A and B). The 1993 regulation was the same. Ins 1702.071(c)(5) (1993) (Motion Exhibit C).

12. The regulation effective January 30, 2009 provided for return of excess funds to the health care providers who had been charged but also provided that the funds could be used to reduce future NHMMJUA assessments. The regulation provided that the Trust “shall return the excess to those health care providers who have been charged in a manner which is fair and equitable, or shall be applied against and reduce future assessments of the association.” Ins 1703.08(e) (2009) (Motion Exhibit D). However, this potential alternative use is no longer relevant. There were no assessments by the NHMMJUA between 2009 and the time the NHMMJUA was placed in receivership, and the statute now prohibits assessments. See RSA 404-B:16, IV.

13. In light of the MedPro transaction, which transferred the NHMMJUA’s Coverage Obligations to MedPro, the \$3.2 million remaining in the SRF is no longer needed because there can be no deficit due to the NHMMJUA’s pre-1986 policies. The Receiver accordingly seeks to “return” these excess funds to the health care providers (“policyholders” as defined in the regulation) who paid the surcharges in accordance with the regulation.

14. The regulation provides that the excess in the SRF is to be “returned” to the health care providers who paid the surcharges in a manner which is “fair and equitable.” Ins 1703.08(e) (2009); Ins 1702.071(c)(5) (1993); Ins 1702.071(c)(5) (1986). As a “fair and equitable” manner of returning the excess funds, the Receiver proposes to allocate the remaining SRF funds to the health care providers who paid SRF surcharges in proportion to the surcharges that the providers paid. Each health care provider that paid surcharges will be allocated a portion of the remaining funds equal to the portion of the total surcharges that it paid.

15. The Receiver relies on a compilation of surcharge payment information prepared by the NHMMJUA’s accountants in 2001. The surcharges themselves were collected more than 23 years ago, and the NHMMJUA did not itself collect all of the surcharges. (Providers that had previously been insured by the NHMMJUA but were not insured by the NHMMJUA during a year when surcharges were collected paid surcharges through their then-current insurer. See Ins 1702.071(c)(2) (1986).) Fortunately, in 2001, the NHMMJUA’s Board of Directors directed the NHMMJUA’s accountants to identify the providers who paid the surcharges and the amounts they paid during the years 1986 through 1993. As part of that effort, the accountants requested information from other insurers who had collected surcharges for transmission to the SRF. Based upon their review of the NHMMJUA’s records and the responses from other insurers, the NHMMJUA’s accountants prepared a spreadsheet containing the names of the providers they could identify who paid SRF charges, a policy number (which may not be a NHMMJUA policy number), and the surcharges paid by each such provider. The accountants were able to identify the source of surcharge payments by 3,409 providers² totaling \$20,563,393. That total represents 88.6% of the \$23,200,612 in surcharges that was paid into the SRF during the years the surcharge was in effect.

² Some providers have more than one entry, so the number of distinct providers is slightly less.

16. Given the time since 2001, and the state of the NHMMJUA's records, the Receiver does not believe that a more complete listing of the providers who paid the surcharges and the amounts paid by each provider can be prepared. The Receiver accordingly proposes to rely on the 2001 spreadsheet and to allocate the remaining SRF funds among the providers based on the providers' respective surcharge payments as a proportion of the \$20,563,393 of surcharge payments that can be identified. Using the total of identified surcharges as the denominator avoids having a portion of the excess SRF funds being unclaimed from the start of the distribution. The Receiver is not aware of any means of identifying providers who may have contributed to the SRF but were not identified during 2001. The proposed return of the \$3.2 million remaining in the SRF will return approximately 15% of the \$20,563,393 in surcharge payments made by the 3,409 health care providers to those providers.

17. The spreadsheet prepared by the NHMMJUA's accountants in 2001 does not include provider addresses. The Receiver has accordingly attempted to cross-reference the 3,409 provider names on the spreadsheet to the policyholder names and addresses used for the mailing to policyholders of notice of the MedPro transaction, which incorporated information provided by Nixon Peabody LLP, counsel for the plaintiff class in the prior action regarding the distribution NHMMJUA surplus (Docket No. 217-2010-CV-00414). Using the Microsoft "Fuzzy Match" program for Excel and some supplemental manual review, this effort matched 2,445 of the surcharge-paying providers with names of NHMMJUA policyholders for whom there was a single address and 579 for whom there were multiple addresses. The Receiver then attempted to match the remaining names using policy number information, cross-references within the list, and in a few instances matching initials to names. This process matched 3,264 of the health care provider names with either single or multiple addresses. 145 of the provider

names did not match with any policyholder name. The Receiver reviewed information from the accountants and attempted to match the corporate names included in these 145 with names on the New Hampshire Secretary of State's website and located addresses for an additional 22 names. Ultimately, the Receiver identified addresses for 3,294 (96.63%) of the 3,409 providers. Of the remaining 115 providers, 90 paid less than \$100, and in a number of cases \$0, in surcharges.


18. The Receiver proposes to mail a letter in the form attached as Exhibit E to the Motion to each health care provider at the addresses identified through the process described above (except for the 115 with no known address) advising that a check will be issued after the provider responds with confirmation of its current address. The letter includes an address confirmation form to be returned to the Receiver. Where more than one address is available, the Receiver will mail a letter to each address. The Receiver will also post on the New Hampshire Insurance Department website (a) the list of the names and towns of the provider SRF return recipients (the "SRF Return Provider List"), (b) notice in the form attached as Exhibit F to the Motion stating that the SRF Return Provider List is available on the website and requesting that providers check the list and confirm their addresses, and (c) the form of address confirmation attached as Exhibit G to the Motion to be used to confirm the recipients' current addresses. The Receiver will also publish a notice in the form attached as Exhibit F to the Motion in two New Hampshire newspapers of general circulation stating that the SRF Return Provider List is available on the website and requesting that providers check the list and confirm their addresses. The Receiver also plans to provide notify the New Hampshire Medical Society and any other relevant professional association of the return of excess SRF funds and to request that the association notify its members that a return is available to those on the list upon confirmation of address.

19. The Receiver will make the mailing to the health care providers, post the notice, the SRF Return Provider List and the address confirmation form on the website, and publish the notice within 60 days after the Court's order granting this motion. In order to bring this process to closure in a reasonable time, the Receiver proposes to include in the notice and letters a convenient weekday date certain, to be set by the Receiver but approximately 120 days after the Court's order, by which time address confirmations must be provided to the Receiver in writing. The Receiver will mail checks within 60 days thereafter. If more than one person asserts that a particular SRF refund amount should be paid to them, the Receiver will make a recommendation to the Court as to how to proceed.

20. Due to the passage of time, the Receiver expects that a number of the health care providers on the list will not respond to the requests for confirmation of addresses. In the absence of a response to the request for confirmation of address, the portion of the SRF return funds allocated to the provider will be undeliverable and no check will be issued. The SRF return funds corresponding to such providers, as well as the SRF return funds reflected in any issued checks which remain uncashed for six months will be reported and delivered to the Abandoned Property Division of the New Hampshire State Treasury, where the funds may continue to be claimed, pursuant to RSA 471-C:9. That statute provides for reporting of refund amounts to the Abandoned Property Division one year after a refund is payable.

21. The Receiver will report to the Court on the progress of the notice and SRF return process as part of the Receiver's monthly reports.

Signed under the penalties of perjury this 9 day of March, 2018.



Peter A. Bengelsdorf
Special Deputy Commissioner of the New Hampshire
Medical Malpractice Joint Underwriting Association

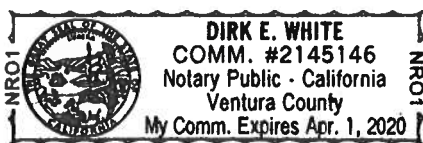
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached and not the truthfulness, accuracy or validity of that document.

STATE OF CALIFORNIA
COUNTY OF VENTURA

On MARCH 9, 2018 before me, Dirk E White Notary Public, personally appeared Peter A. Bengelsdorf, Special Deputy Commissioner of the New Hampshire Medical Malpractice Joint Underwriting Association, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature 
Signature of Notary Public